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NO. 08-1572

IN THE
SUPREME COURT OF THE UNITED STATES

PETER HOFFMAN, CINEVISIONS, SEVEN ARTS PICTURES, INC., SEVEN ARTS FILMED ENTERTAINMENT LIMITED AND SEVEN ARTS PICTURES,

Petitioners

v.

JONESFILM,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

PARTIES TO THE PROCEEDINGS

The Petition accurately lists Jonesfilm as a party to the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Respondent Jonesfilm discloses that it is a joint venture organized under the laws of the State of Pennsylvania. The two joint venturers of Jonesfilm are Sidney Kimmel Presentations, Inc., and SKPI Corp., both of which are Delaware corporations, and all of their shares are owned by Sidney Kimmel. There is no parent or publicly held company owning 10% of more of either corporation's stock.

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STATEMENT OF THE CASE

Respondent Jonesfilm ("Jonesfilm") submits this brief in opposition to the improvident Petition of Peter Hoffman ("Hoffman") and Hoffman's companies Cinevisions, Seven Arts Pictures, Inc. ("SAP"), Seven Arts Filmed Entertainment Limited ("SAFE"), and Seven Arts Pictures PLC ("PLC") for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

In this Respondent's Brief, Hoffman's companies (Cinevisions, SAP, SAFE, and PLC) are collectively referred to as the "Hoffman Companies", and Hoffman and the Hoffman Companies are collectively referred to as the "Hoffman Parties" or "Petitioners".

Petitioners now attempt to contrive appellate grounds to overturn the arbitration awards confirmed against them by raising spurious issues as to arbitral jurisdiction and defenses. However, the simple reality is that none of those issues even properly exists.

Rather, each of the Hoffman Companies received from its predecessor affiliate an assignment of underlying rights subject to a contractual mandatory arbitration clause, and then sought the benefit of those underlying rights; assumed, and became bound by and estopped to deny, that mandatory arbitration clause; in any event, then voluntarily participated in the arbitration at issue under that arbitration clause; and so has no basis to complain as to the arbitral jurisdiction over it.

Likewise, under the rules of the contractually-designated arbitration association, each Petitioner was required to serve its "Statement of Defense" setting forth its defenses to the Notice of Arbitration; but none of Petitioners ever submitted any "Statement of Defense"; and so each of Petitioners was properly found to have waived its defenses.

Even worse, Petitioners now come to this Court with unclean hands from their history of misconduct in the proceedings. As the Arbitrator found, and the Courts below confirmed, Petitioners disobeyed the arbitrator's document subpoenas, turnover orders, and restraining orders. Moreover, Petitioners did not dispute, and the Courts found, that during the second half of the bifurcated arbitration at issue, Petitioners engaged in outright threats against and intimidation of each of Respondent's witnesses and arbitrator which "permeated the entire proceedings" [5a-6a].

After the arbitration awards were confirmed, each of the Petitioners disobeyed the District Court's turnover, tracing, accounting, and other orders; for that disobedience of the Court's orders, each Petitioner was held in contempt; but none of Petitioners ever purged their contempt [5a]. Petitioners have not appealed to this Court, and their time to appeal has expired, with respect to the adjudications of their misconduct in disobeying the arbitration and court orders; their threats against and intimidation of witnesses and arbitrator; the contempt adjudications against them; and their failure to purge their contempt.

1. Case Background.

A. The Jonesfilm/NTTS Agreement and Its Mandatory Arbitration Clause.

Jonesfilm entered into an Agreement with NTTS Productions Ltd. ("NTTS") and Cinevisions dated as of October 15, 2005 (the "Jonesfilm/NTTS Agreement") relating to sequel rights to Jonesfilm's motion picture "9 ½ Weeks". Hoffman then owned Cinevisions; in turn, Cinevisions was then sole shareholder of NTTS; and the Jonesfilm/NTTS Agreement was signed by Hoffman for both Cinevisions and NTTS [51a-53a].

The Jonesfilm/NTTS Agreement provided in pertinent part that [53a]:

> (i) "Any transfer, mortgage, assignment or other disposition of any sequel rights shall be subject to [Jonesfilm's] rights" under the Agreement [§10];
>
> (ii) "No assignment by Purchaser [NTTS]" "shall relieve it of its obligations" under the Agreement" [§15];
>
> (iii) the Agreement "shall be governed by the laws of the State of California" [§14]; and
>
> (iv) "In the event of any dispute ... relating to the subject matter hereof, ... any and all such disputes shall only be resolved by binding arbitration in the City of Los Angeles

pursuant to the arbitration provisions of the American Film Marketing Association" [§14].

Cinevisions not only co-signed that Agreement, but also therein agreed to be "a joint and several obligor of all liabilities and agreements of" NTTS under that Agreement [53a].

NTTS then produced and later publicly released a sequel known as *9 ½ Weeks II* aka *Another 9 ½ Weeks* aka *Love in Paris* (the "Second Picture"), which was initially owned by, and its copyright registered in the name of, NTTS [55a].

B. The Hoffman-Arranged Transfer of the Second Picture Rights through His Companies - from NTTS through Cinevisions, then to SAP, thence to SAFE, and Finally to PLC.

(i) Transfer of All NTTS' Assets to Cinevisions.

Hoffman [who himself was found to be an "alter ego" of NTTS, 61a] testified that "sometime between 1999" and 2001", he caused NTTS to transfer all its assets (and thus the Second Picture, related rights and other assets) to his company Cinevisions, leaving NTTS "with no further assets" and "inactive" [55a & 59a].

In light of Cinevisions' acquisition of the Second Picture and those other rights, Cinevisions was and is jointly and severally liable to Jonesfilm under the Jonesfilm/NTTS Agreement as (i) an express signatory thereto in which Cinevisions

agreed to be jointly and severally liable for all of NTTS' liabilities and agreements thereunder [53a]; (ii) an assignee of NTTS' sequel rights thereunder; and (iii) as assignee of all NTTS' assets and business.

(ii) Transfer of Cinevisions' Assets to SAP.

Hoffman next arranged for his companies Cinevisions and SAP [Seven Arts Pictures, Inc.] to enter into (and Hoffman signed for both those companies) an Asset Transfer Agreement dated as of October 1, 2002, pursuant to which Cinevisions purported to assign to SAP all Cinevisions' right, title, and interest with respect to the Second Picture, and SAP assumed all obligations, responsibilities, and liabilities under the Jonesfilm/NTTS Agreement and related security instruments. They later admitted that transfer was "part of a sale of substantially all the assets of [Cinevisions]", and that as a result of that sale, Cinevisions was left without assets and "inactive". [57a]

(iii) Transfer of the Second Picture Rights from SAP to SAFE.

Several years later, Hoffman caused his company SAP to form a subsidiary SAFE [Seven Arts Filmed Entertainment Limited], and to enter with SAFE into an Asset Transfer Agreement dated as of October 2004 (signed by Hoffman as SAFE's Chairman/managing director) in which SAP purported to transfer its Second Picture rights to SAFE for all "the issued share capital" of SAFE. SAFE took that assignment "subject to ... all...

obligations, responsibilities and liabilities of Seven Arts pursuant to the terms of the Film Agreements" and "to all ... obligations, responsibilities, and liabilities" of SAP (and predecessors NTTS/ Cinevisions) under the Jonesfilm/NTTS Agreement and related documents. [57a-58a]

(iv) Transfer of the Second Picture Rights from SAFE to PLC.

Hoffman testified that all shares of SAFE were transferred to PLC [Seven Arts Pictures PLC]; SAFE thus became a wholly-owned subsidiary of PLC; and the Second Picture and related rights were then transferred from SAFE to its new parent PLC [58a].

Indeed, Hoffman delivered a Memorandum on Seven Arts letterhead which summarized the above-described Hoffman-arranged transfers of Second Picture rights as follows:

> "the distribution rights and later the copyright to this picture have and continue to be held by Cinevisions and from Cinevisions, Seven Arts Pictures, Inc. .. as of approximately September 2, 2004 Seven Arts Pictures, Inc. has transferred those rights to Seven Arts Pictures PLC."

C. The Initial IFTA Arbitration Proceedings between Jonesfilm and the Hoffman Companies.

A series of disputes arose between Jonesfilm and the Hoffman Companies with respect to the Second Picture and related sequel rights under the Jonesfilm/NTTS Agreement. Accordingly, Jonesfilm during August 2005 filed Notice of Arbitration with IFTA [the International Film & Television Alliance, formerly known as the American Film Marketing Association ("AFMA")] and served that Notice of Arbitration on each of the Hoffman Companies [namely Cinevisions, SAP, SAFE, and PLC]. [62a]

D. Throughout the IFTA Arbitration, the Hoffman Companies' Failed to Submit the Required "Statement of Defense".

Because Jonesfilm is a Pennsylvania joint venture, and two of those Hoffman companies were incorporated in the U.K. [64a], IFTA gave notice the arbitration would be governed by, and then conducted the arbitration under, IFTA's Rules of International Arbitration.

Under IFTA Rule 8.5, each of the Hoffman Companies was required to file and serve a "Statement of Defense" ("setting forth the facts and other contentions of law on which respondent's defense is based") within 21 days after service on it of Jonesfilm's Arbitration Notice [4a-5a]. Although each of Hoffman's Companies received Jonesfilm's Notice of Arbitration by the end of August 2005, none of them (and thus none of Petitioners Cinevisions, SAP, SAFE, or PLC) ever submitted any "Statement of Defense".

But, although the Hoffman companies did not submit a Statement of Defense, they did through Hoffman (their chief executive officer and controlling shareholder) participate in designating Steven Strick to serve as Arbitrator for the IFTA Arbitration.

E. The IFTA Arbitrator Found that Each of the Hoffman Companies Was Required to Arbitrate under the Jonesfilm/NTTS Agreement's Mandatory Arbitration Clause.

Shortly after the Arbitrator's appointment, the Hoffman Companies sought from, and were granted by, the Arbitrator leave to brief their argument that IFTA lacked jurisdiction over them. After "careful review" of that briefing, the Arbitrator issued a January 5, 2006 Decision, rejecting their arguments, and instead finding the Arbitrator "has both personal jurisdiction over each of them and subject matter jurisdiction to hear and issue a binding ruling in connection with the issues presented in the current Arbitration". [63a] See *George Day Construction Co., Inc. v. United Brotherhood* (9th Cir. 1984), 722 F.2d 1471, 1475-77, (where a party argued the issue of arbitrability to an arbitrator, that party is deemed to have consented to allow the arbitrator to decide arbitrability, and thus the court should defer to the arbitrator's finding of arbitrability).

F. The District Court Likewise Found that Each of Hoffman's Companies Was Required to Arbitrate under the Jonesfilm/NTTS Agreement's Mandatory Arbitration Clause.

After receipt of the IFTA Arbitrator's Decision upholding arbitral jurisdiction over them, the Hoffman Companies then sought from the United States District Court a stay of arbitration, again arguing the IFTA Arbitrator had no jurisdiction over them [63a].

However, the District Court rendered a March 8, 2006 Decision which described the history of Hoffman-arranged assignments of the Second Picture rights through the Hoffman Companies (from NTTS, through Cinevisions, then through SAP, thence through SAFE, and finally to PLC); found the Hoffman Companies had received an assignment of rights under and "essentially became parties to", the Jonesfilm/NTTS Agreement and its contractual mandatory arbitration clause; and so held each of the Hoffman Companies required to arbitrate with Jonesfilm under that mandatory arbitration clause. Accordingly, the District Court denied the Hoffman parties' Motion to Stay the Arbitration, and instead stayed all further District Court proceedings until the IFTA Arbitration was completed. [65a-75a]

G. The Hoffman Companies [Cinevisions, SAP, SAFE, and PLC] Acknowledged They Had Presented Their Case at the March 2006 IFTA Arbitration Hearings.

A first set of formal arbitration hearings was held before the IFTA Arbitrator during March 2006, at which Hoffman appeared for Cinevisions; testified

extensively; and cross-examined Jonesfilm's witnesses.

Nearly a week after those formal hearings ended, Hoffman filed with IFTA on Seven Arts letterhead, March 8 and 10, 2006 Memoranda which requested the Seven Arts Companies (namely SAP, SAFE, and PLC) be deemed to have "present[ed] their case based on the evidence and documents submitted by Cinevisions". Thereafter, the parties submitted post-hearing briefs and related documents. [41a]

H. The IFTA Arbitration Awards.

The IFTA Arbitrator issued a June 22, 2006 Findings of Fact, Judgment and Partial Award (the "Partial Award") which granted Jonesfilm's requests for declaratory, injunctive, and other equitable relief against the Hoffman Companies; awarded Jonesfilm mandatory indemnity of its fees and costs incurred; but, in light of the Hoffman Companies' prior disobedience of subpoenas to provide an accounting and other documentation, deferred decision as to "Net Receipts" due Jonesfilm until further formal arbitration hearings could be held thereon.

During autumn 2006 arbitration hearings were held as to "Net Receipts" so due Jonesfilm; but before and during those hearings, Hoffman and his companies made a series of threats against the witnesses and arbitrator to intimidate those witnesses from testifying and the arbitrator from deciding against the Hoffman Parties as to "Net Receipts" due Jonesfilm (those threats and that

intimidation being later found by the Ninth Circuit Court of Appeals to have "permeated the entire proceeding" (6a); and the then-intimidated arbitrator thereupon issued a January 16, 2007 Final Award denying Jonesfilm any "Net Receipts".

I. The IFTA Awards Explicitly Pointed Out The Hoffman Parties' Failure to File Any "Statement of Defense".

The IFTA arbitrator's Partial Award and later the Final Award explicitly pointed out that the Hoffman Companies had been required by the IFTA Rules to file, but had never filed, a Statement of Defense.

2. The District Court Confirmed the IFTA Arbitration Awards.

After receipt of the IFTA Arbitrator's January 16, 2007 Final Award, Hoffman and his companies filed a Summary Judgment Motion asserting purported defenses to, and thereby seeking to vacate, the arbitration award. However, the District Court ruled that an arbitrator's findings and conclusions are subject to an extremely deferential standard of review under the Federal Arbitration Act [the "FAA", 9 U.S.C. §1 *et seq.*]; thus the Hoffman Parties' Summary Judgment Motion was "an improper vehicle" to vacate an arbitration award; and so denied the Hoffman Parties' improvident Summary Judgment Motion [45a-47a]

Jonesfilm then moved to (i) confirm the IFTA Awards (other than the tainted part of the Final

Award denying Jonesfilm "Net Receipts" from the Second Picture), and (ii) vacate that tainted denial of "Net Receipts" on the basis of the Hoffman Parties' threats and intimidation against witnesses and arbitrator which "permeated" the "Net Receipts" portion of the arbitration. [33-34a]

The Hoffman Parties did not deny (and so implicitly or explicitly conceded) their threats or other intimidation against witnesses and arbitrator.

The District Court observed Jonesfilm's contention that the portion of the Award denying Jonesfilm "Net Receipts" had been procured by threats and intimidation; ignored the Hoffman Parties' admissions against interest and other evidence as to the actual amount of "Net Receipts" which should have been awarded to Jonesfilm; instead confirmed the arbitration awards in their entirety; and so denied, on the one hand, the Hoffman Parties' efforts to vacate the awards, and, on the other hand, Jonesfilm's motion to vacate the tainted portion of the awards denying Jonesfilm "Net Receipts". [40a]

3. The Ninth Circuit Court of Appeals Denied the Hoffman Parties' Appeal and Jonesfilm's Cross-Appeal, and So Affirmed the District Court Decision Confirming the IFTA Arbitration Awards.

The Hoffman Parties appealed the District Court decisions confirming the arbitration awards, and Jonesfilm cross-appealed the District Court's denial of its Motion to Vacate that tainted portion of the Award denying Jonesfilm "Net Receipts" for the

threats against and intimidation of Jonesfilm witnesses and arbitrator. [2a-6a]

The Ninth Circuit Court of Appeals affirmed the District Court awards as it found that the Hoffman Companies (Cinevisions, SAP, SAFE, and PLC) had acquired the Second Picture and related sequel rights; were bound by the agreements and obligations under the Jonesfilm/NTTS Agreement, and in particular their obligation to arbitrate under its mandatory arbitration clause; and had waived their defenses by failing to submit a Statement of Defense as required under the IFTA Arbitration Rules [4a-5a].

The Ninth Circuit Court of Appeals affirmed the District Court's denial of Jonesfilm's motion to vacate the Net Receipts portion of the arbitration award on the grounds that the Hoffman Parties' threats against and intimidation of witnesses and arbitrator had been disclosed to the Arbitrator and "permeated the entire proceeding". [5a-6a]

The Ninth Circuit then denied the Hoffman Parties' petition for panel or en banc rehearing. [77a-78a]

REASONS FOR DENYING THE WRIT

In arguing that the Ninth Circuit erred in affirming the arbitration awards, Petitioner Hoffman Parties ignore (among other things) (i) the Hoffman-arranged assignments through the succession of Hoffman's companies (from NTTS through Cinevisions, then through SAP, then

through SAFE, and finally to PLC) of sequel rights under the Jonesfilm/NTTS Agreement and related assumption by the Hoffman Companies of the mandatory arbitration clause and other obligations under the Jonesfilm/NTTS Agreement; the subsequent voluntary participation by each of the Hoffman Parties in the arbitration proceedings; the failure of the respective Hoffman Companies to file a "Statement of Defense" as required under governing IFTA arbitration rules; and the Hoffman Parties threats against and intimidation of Jonesfilm's witnesses and arbitrator which had "permeated" and so tainted the bifurcated "Net Receipts" portion of the arbitration.

The Ninth Circuit's decision correctly denied the Hoffman Parties' appeals with respect to application of federal or state law governing arbitrations. No conflict among the circuit courts, among panels within the Ninth Circuit, or with decisions of this Court is properly urged by Petitioner Hoffman Parties. Nor do the Hoffman Parties cite any departure from the accepted and usual course of judicial proceedings, or any important question of federal law that should be settled by the Court. None of the questions sought to be raised by Petitioner Hoffman Parties provides any compelling reason to merit review by this Court. See Supreme Court Rule 10.

A. Contrary to Petitioners' First Question Presented, Each of the Hoffman Companies Voluntarily Accepted the Sequel Rights Transferred and So Assumed the Obligations (Including Mandatory Arbitration

Obligations) under the Jonesfilm/NTTS Agreement; Then Voluntarily Participated in the IFTA Arbitration; and Thus Has No Grounds to Contest Arbitral Jurisdiction.

The District Court's March 8, 2006 Decision found the Jonesfilm/NTTS Agreement was signed by NTTS, Cinevisions and Jonesfilm; that Agreement granted NTTS an option to produce a sequel; and NTTS did exercise that option and did produce a sequel known as the Second Picture [aka *9 ½ Weeks II*] [53a].

As the District Court correctly found, the Jonesfilm/NTTS Agreement states '[a]ny transfer, mortgage, assignment or other disposition of any sequel rights [and thus any transfer of the Second Picture and related sequel rights] shall be subject to [Jonesfilm's] rights hereunder"; Jonesfilm's rights under the Agreement included the right to invoke a mandatory arbitration clause ["in the event of any dispute between the parties relating to the subject matter hereof, the parties hereby agree that any and all such disputes shall only be resolved by binding arbitration" before AFMA now known as IFTA]; and "Cinevisions is a "joint and several obligor of all liabilities and agreements" of NTTS under the contract, and thus a joint and several obligor of the mandatory arbitration agreement [A53a].

The District Court further correctly found that the Hoffman Companies effected a series of assignments transferring Second Picture rights to and through the respective Hoffman Companies (namely from NTTS to Cinevisions, to SAP, to SAFE,

and then to PLC) [55a-59a] For instance, the District Court found that:

> (i) Hoffman "has testified that NTTS transferred all of its rights to CineVisions" [55a], and that NTTS thereafter ceased to hold any assets [59a];
>
> (ii) Cinevisions then transferred the rights in the Second Picture to SAP, and that transfer to SAP appears to have taken place on October 1, 2002 [57a];
>
> (iii) SAP transferred the rights in the Second Picture to SAFE, and SAFE agreed to take the assignment subject to "all of the obligations, responsibilities and liabilities of SAP [Seven Arts] pursuant to" any existing agreements [57a-58a]; and
>
> (iv) SAFE's rights in the Second Picture and other projects and completed films were transferred to and acquired by PLC [58a].

The District Court also correctly observed that the IFTA Arbitrator already determined arbitrability of the dispute, and that, under California law, there is a rule of substantial deference to an arbitrator's jurisdictional determination [69a]. *Schoenduve Corp. v. Lucent Technolgies, Inc.*, (9th Cir. 2006), 442 F.3d 727, 733 ("arbitrator's interpretation of the scope of his powers is entitled to the same level of deference as his determination on the merits") [citations omitted]; *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) (reh. den.) (rev. den.), 87

Cal. App. 4th 534, 542, 104 Cal Rptr. 2d 686, 692, citing *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 374, 36 Cal. Rptr. 2d 581, 885 P.2d 994.

However, the District Court found it need not rely on the arbitrator's determination of arbitrability, because the District Court independently agreed, on multiple grounds, with the arbitrator's determination [69a-70a].

First, the District Court so observed that non-signatories may be bound by arbitration provisions under ordinary contract and agency principles, including (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. [71a, citing *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986)]. Indeed, the District Court observed that an arbitration clause would be rendered almost meaningless if it could be avoided by a contracting party's simple assignment of the contract to a related, non-signatory entity (as by Hoffman-arranged assignments from one of his companies to another) [71a-72a].

The District Court then found that "through the assignment from CineVisions, SAP [Seven Arts] and its assignees SAFE and Seven Arts Pictures PLC essentially became parties to the JF/NTTS Agreement"; the Agreement states any such assignment "shall be subject to [Jonesfilm's] rights" under that Agreement; Jonesfilm's rights under that Agreement include Jonesfilm's right to enforce the Agreement's mandatory arbitration clause; and thus Jonesfilm was contractually entitled to enforce its

mandatory arbitration clause against each of the assignee Hoffman Companies (namely Petitioners Cinevisions, SAP, SAFE, and PLC) [75a]. See *Corbin on Contracts Interim Ed.* §892 at 519 ("If the obligor's contract with the assignor provides for arbitration of disputes arising out of the contract, this provision is applicable for and against the assignee just as it was against the assignor"); B*anque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F.S. 1464, 1469-1470 (SDNY 1983) (assignee of rights to contract containing arbitration clause is bound to arbitrate under that clause).

Second, the District Court found it to be an established principle of California law that the party who takes the benefit of a transaction must also bear the burden [Cal. Civ. Code §§ 3521 & 1589]. The District Court then found that, because the Hoffman Parties had filed suit, seeking the benefit of a declaratory judgment, against Jonesfilm as to rights in the Second Picture, and so sought and took the benefit of rights to the Second Picture, the Hoffman Parties must bear the burden of the related mandatory arbitration clause governing their dispute with Jonesfilm as to those rights [72a-74a]. See *Foreman Roofing Inc. v. United Union*, 144 Cal. App. 3d 99, 106-7, 192 Cal. Rptr. 439, 444 (1983) (purported title assignment subjects assignee to assignor's contractual obligation to arbitrate disputes); *Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp.*, 106 Cal. App. 4th 779, 789-90, 131 Cal. Rptr. 2d 347, 354 (2003); *Veterans of Foreign Wars v. City of El Paso de Robles*, 62 Cal. App. 4th 1077. 1080, 73 Cal. Rptr. 2d 171, 173 (1998);

Fanning v. Yoland Productions, 150 Cal. App. 2d 444, 450-451, 310 P.2d 85, 89 (1957).

Third, the District Court found that under California law a non-signatory to an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of that same contract that benefit him, citing *Metaclad Corp. v. Ventana Environmental Org. Partnership* (2003), 109 Cal. App. 4th 1705, 1713, 1 Cal. Rptr. 3d 328; the Hoffman Companies so sought to enforce provisions of the Jonesfilm/NTTS Agreement for their benefit by seeking declaratory judgment as to their sequel and other ownership rights with respect to the Second Picture; and thus the Hoffman Companies were estopped to deny application against them of the Jonesfilm/NTTS Agreement's mandatory arbitration clause in connection with their dispute with respect to the Second Picture [73a-74a]. *Boucher v. Alliance Title Co., Inc.*, 127 Cal. App. 4th 262, 272, 25 Cal Rptr. 3d 440 (2005) ("party may not make use of a contract containing an arbitration clause and then attempt to avoid the duty to arbitrate").

Fourth, the District Court's June 18, 2007 Decision defined "Seven Arts" to include SAP, SAFE, and PLC [40a], and then found that, "despite ... protestations to the contrary, Seven Arts participated in the arbitration when it agreed to 'present [its] case based on the evidence and documents submitted by Cinevisions" [41a]. Each of SAP, SAFE, and PLC, by agreeing to presentation of its case to the IFTA Arbitrator based on the evidence

and documents submitted by Cinevisions, so waived objection to arbitral jurisdiction.

The affirming decision of the Ninth Circuit Court of Appeals tracked much of the District Court reasoning.

The Ninth Circuit so agreed that Cinevisions was bound by the mandatory arbitration clause as a signatory of and "joint and several obligor" under the Jonesfilm/NTTS Agreement [4a].

The Ninth Circuit further agreed that the rights which the other Hoffman Parties [namely, Hoffman, SAP, SAFE, and PLC] sought to assert against Jonesfilm "included rights granted in the Jonesfilm/NTTS Agreement, which [they] received through a series of assignments from NTTS"; those Hoffman Parties were bound by the Jonesfilm/NTTS Agreement under ordinary contract principles of estoppel and alter ego; and thus those Hoffman Parties were bound to arbitrate their dispute with Jonesfilm under the Jonesfilm/NTTS Agreement's mandatory arbitration clause [4a].

In short, each of the Hoffman Companies by so accepting assignment of the Second Picture and related sequel rights under the Jonesfilm/NTTS Agreement, and by invoking the benefit of that Agreement for itself, was bound by and required to arbitrate under that Agreement's mandatory arbitration clause, and, in any event, each of them further voluntarily participated in the IFTA arbitration and so waived any objection to IFTA jurisdiction over the arbitration.

B. The Hoffman Parties Are Not Entitled to Review of Defenses Which under Applicable Arbitration Rules They Were Required to Include in a "Statement of Defense", as They Never Submitted Any "Statement of Defense" and So Waived Those Defenses.

The Hoffman Parties' belated attempt to argue standards of review governing their purported defenses is likewise irrelevant and improper, as they never filed the required "Statement of Defense", and so waived any defense.

The District Court had properly denied the Hoffman Parties' summary judgment motion, as that motion was an improper vehicle for vacating an arbitration award [citing the FAA, 9 U.S.C. §10] [4a].

The District Court later reviewed, and found no grounds to vacate, the arbitration awards under either the FAA or California law. Rather, the District Court found [41a] that "both the Partial and Final Awards contain thorough and well-supported findings of fact and conclusions of law", and that:

> "the Awards are not completely irrational, exhibit no manifest disregard for the law or public policy, and do not otherwise fall within any of the grounds set forth by either the FAA or California law for vacating an arbitration award".

In any event, the IFTA Arbitration Awards themselves explicitly found that the Hoffman

Companies were required, but had failed, to submit a "Statement of Defense". In the words of the Arbitration Awards:

> "Under IFTA Rule 8.5, each [Hoffman Company] was required to file and serve its Statement of Defense ('a statement setting forth the facts and other contentions of law on which respondent's defense is based') within 21 days after service on it of Jonesfilm's Notice of Arbitration. Each of the [Hoffman Companies] received by Federal Express on August 8, 2005 a copy of Jonesfilm's Notice of Arbitration. Accordingly, each Respondent's Statement of Defense was due by the end of August 2005. None of Respondents filed any Statement of Defense."

See *Minton v. Cavaney* (1961), 56 Cal. 2d 15, 364 P.2d 473 ("defendants ... waived the defense of the statute of limitations by failing to plead that defense in the answer to the complaint"); *Hambrecht & Quist Venture Partners v. American Medical International, Inc.* (1995), 38 Cal. App. 4th 1532, 1548, 46 Cal. Rptr. 2d 33 ("once sued, if a defendant does not timely raise a limitations defense, it is waived regardless of how long the plaintiff has delayed"); *Gailing v. Rose, Klein & Marias* (1996), 43 Cal. App. 4th 1570,1577, 51 Cal. Rptr. 2d 381, 385, citing *Adams v. Paul*, 11 Cal. 4th at 597, 46 Cal Rptr. 2d 594, 904 P.2d 1205.

The Hoffman Parties have stated no reason for their failure to file, nor to be relieved from the consequences of their failure to file, the required

"Statement of Defense". Nor have the Hoffman Parties cited any case or other law, in which an arbitrant was permitted to pursue an appeal as to defenses required by the arbitration association to be, but not, included in the "Statement of Defense" – particularly where (as here) the Hoffman Parties never submitted any "Statement of Defense".

Thus, the Court of Appeals correctly held that, in light of the Hoffman Companies' failure to submit the "Statement of Defense" required by the IFTA arbitration rules, the arbitrator properly decided not to consider their defenses and other arguments which should have been, but were not, set forth in that "Statement of Defense" [4a-5a].

Indeed, any other federal court holding, as to an arbitrant's failure to comply with governing arbitration association rules, would thwart the arbitration association's ability to develop, implement, and enforce rules governing arbitrations before it; so undermine the arbitration process; and instead lead to undue federal court involvement in arbitration proceedings.

C. The Hoffman Parties Are Not Entitled to Request Any Change in the Existing Standard of Review of Defenses, As They Waived Those Defenses by Not Submitting the Required "Statement of Defense" in the Arbitration Proceedings.

As described above, the Hoffman Parties were required under governing arbitration rules to file a "Statement of Defense"; during the entirety of the

arbitrations never filed any "Statement of Defense"; so waived any defenses they could have asserted, but did not assert; and should not be rewarded now with another opportunity to argue those very defenses they previously failed to properly assert.

Having failed to properly assert and thus waived those defenses, the Hoffman Parties have no standing, and should not be heard, to question the standard of review for those waived defenses.

In short, none of the questions raised by Petitioner Hoffman Parties raises any issue under Supreme Court Rule 10 or otherwise for review by the Supreme Court.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for writ of certiorari.

Respectfully submitted,
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